IN THE SUPREME COURT OF INDIA

(CIVIL APPELLATE JURISDICTION)

I.A. No 8 of 2010

in

SPECIAL LEAVE PETITION NO. 15436 OF 2009

IN THE MATTER OF

Suresh Kumar Koushal & Anr. Petitioners

Versus

Naz Foundation, & Ors. Respondents

AND IN THE MATTER OF:

Minna Saran and Others Intervenors

WRITTEN SUBMISSIONS FILED ON BEHALF OF INTERVENOR NO. 8, MINNA SARAN AND EIGHTEEN OTHERS (PARENTS OF LGBT CHILDREN) BY MR. FALI S. NARIMAN, SENIOR ADVOCATE AND ADVOCATES ASSISTING HIM.

Part A

Part B

Propositions of Law

V	**Section 377 should be interpreted in the context of its placement in the Indian Penal Code as criminalizing an act in some way adversely affecting the human body and not an act which is an offence against morals**	
VI	**Chapter Headings and sub headings provide a guide to interpreting the scope and ambit of Section 377**	
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XIII	**377 suffers from the vice of arbitrariness and is violative of Article 14**	
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Annexures

I	**Affidavit of Chitra Palekar dated 2nd April, 2011 at Mumbai.**	
II	**Affidavit of Vijaylakshmi Ray Chaudhuri dated 25 March at Diamond Harbour.**	
III	**Affidavit of Dr. K.S. Vasudevan dated 17 March, 2011 at Chennai .**	
IV	**Affidavit of Shobha Doshi dated 2 April, 2011 at Mumbai.**	
V	**A detailed table listing the different professional qualifications and backgrounds of the different applicants and their LGBT children.**	
VI	**Benion on Statutory Interpretation, FifthEdition,2008**	
VII	**Main Note-Theological nature of the origin of anti sodomy statues in England submitted on 1.3.2012.**	

VIII	**G.P. Singh, *Principles of Statutory Interpretation*, 13 Edition, 2012**	
IX	**Sexual Offences Against Children Bill, 2011.**	
X	**Report of the Rajya Sabha Parliamentary Standing Committee on Human Resources Development on The Protection of Children from Sexual Offences Bill, 2011, December 2011.**	

PART A

I. AFFIDAVITS OF Parents of LGBT (Lesbian, Gay, Bisexual and Transgender) persons

- Affidavit of Chitra Palekar dated 2 April 2011 at Mumbai (Vol I of Additional documents filed by Intervenor No 8 at pgs. 200-207) **(Annexure I)**
- Affidavit of Vijayalakshmi Ray Chaudhuri dated 25 March 2010 at Diamond Harbour, (Vol I of Additional Documents filed by Intervenor No 8, pgs. 208-212) (**Annexure II)**
- Affidavit of Dr. K.S. Vasudevan dated 17 March, 2011 at Chennai (Vol II of Additional documents filed by Intervenor No. 8 , pgs. 287-290) **(Annexure III)**
- Affidavit of Mrs Shobha Doshi dated 2 April, 2011 at Mumbai (Vol II of Additional Documents filed by Intervenor No 8 , pgs. 291-294) **(Annexure IV)**

Note: The parents of LGBT persons come from different professional, socio-cultural backgrounds and different regions of India. The parents of LGBT persons who are applicants before this Court also come from a range of professional backgrounds being scientists, teachers, government employees, private sector employees, lawyers, artists and home makers. The states the applicants come from traverse the diversity of India and include Maharashtra, Delhi, West Bengal, Karnataka, Tamil Nadu and Kerala. The applicants submit that they are all united by one common factor as parents of individuals who have come out to them as being either lesbian, gay, bisexual or transgender/hijra. As parents of LGBT individuals, each of the applicants has experienced the personal struggle of having to understand a sexuality at odds with what Section 377 prescribes. A detailed table listing the different professional qualifications and backgrounds of the different applicants and their LGBT children is annexed. **(Annexure V)** It has been the experience of the applicants that Section 377 has affected the quality of family life

making communication between parents and children difficult and also impeded the right to peacefully enjoy family life, making entire families vulnerable to the fear of arrest and prosecution of the applicants children under Section 377. Section 377 has also been an affront to dignity by tainting the Applicants children with the mark of illegality and by implication their families.

PART B

Propositions of Law

II. *The 'unnatural offence' under Section 377 of the Indian Penal Code originates in a notion of sin which is expressed through the law*

2.1 The Bible (Old Testament) Leviticus 18:22, 18:23 and 19:13 (Vol I, Compilation of Intervenor 8 on the history of "Unnatural offences in the United Kingdom, pgs 3-4) (Hereinafter referred to as Vol I)

> *If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them.*
>
> (Leviticus 19:13)

2.2 25 Henry VIII Chapter VI (Vol I, pg. 11)

> *Forasmuch as there is not yet sufficient and condign Punishment appointed and limited by the due course of the Laws of this Realm for the detestable and abominable Vice of Buggery committed with mankind of beast: It may therefore please the King's Highness with the assent of the Lords Spiritual and Temporal, and the Commons of this present parliament assembled, that it may be enacted by the Authority of the same, That the same Offence be from henceforth adjudged Felony, and such Order and Form of Process therein to be used against the offenders as in Cases of felony at the Common law; and that the offenders being hereof convict by Verdict, Confession or Outlawry, shall suffer such Pains of Death and Losses and Penalties of their Goods, Chattels, Debts, Lands, Tenements and Hereditaments as Felons and be accustomed to do, according to the Order of the Common Laws of this Realm; and that no Person offending in any such Offence shall be admitted to his Clergy; and that Justices of the Peace shall have Power and Authority, within the Limits of their*

> *Commissions and Jurisdictions, to hear and determine the said Offence, as they do use to do in the Cases of other felonies. This Act to endure till the last day of the next Parliament. (Emphasis added)*

2.3 Lord Edward Coke, *The Third Part of the Institutes of the Laws of England,* Chapter 10 on buggery or sodomy (Vol I, pgs 10-11)

> *Buggery is a detestable and abominable sin, amongst Christians not to be named, committed by carnall knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast.(Emphasis supplied)*

2.4 An Act for Improving the Administration of Criminal Justice in the East- Indies, 1828. 9 Geo IV. Cap 74 , LXIII on the offence of sodomy (Vol II of compilation filed by Intervenor No 8 the history of 'unnatural offences' in India pg 25) (Hereinafter referred to as Vol II).

Note: This is the first enactment of the British Parliament applicable to British India and other places of trading in the East Indies.

> ***Sodomy.*** LXIII. *And be it enacted, that every person convicted of the abominable crime of buggery committed either with mankind or with any animal, shall suffer death as a felon.*

2.5 Clauses 361 and 362 of the Draft Penal Code of 1837 by Lord Macaulay

(Vol II, pg.42)

> *OF UNNATURAL OFFENCES*
>
> *361. Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.*
>
> *362. Whoever, intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be*

punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine.

2.6 Note M on Offences Against the Body in the Penal Code of 1837 (Vol II, pg.56)

Clauses 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible be said. We leave without comment to the judgment of his Lordship in Council the two Clauses which we have provided for these offences. We are unwilling to insert, either in the text, or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.

2.7 Comment of the Law Commissioners on clauses 361 and 362 in Report on the Indian Penal Code, 1848. (Vol II, pg. 60)

453. Colonel Sleeman advises the omission of both these clauses, deeming it most expedient to leave offences against nature silently to the odium of society. It may give weight to this suggestion to remark that the existing law on the subject is almost a dead letter, as appears from the fact that in three years only six cases came before the Nizamut Adawlut at Calcutta, although it is but too true, we fear that the the frequency of the abominable offences in question "remains", as Mr. A.D. Campbell expresses it,"a horrid stain upon the land"

Note: Colonel Sleeman is best known for his campaign to eradicate thugee.

2.8 Section 377 of the Indian Penal Code, 1860

Of Unnatural Offences

377. Unnatural Offences.- *Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

Explanation.- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section

Note: Section 377 was included as part of the Indian Penal Code 1860 at a time when the only natural object of sexual intercourse was sexual (carnal) that there should be a possibility of a conception of human being. Everything else was characterised as un-natural: See observation of the Bench of two Judicial Commissioners in *Khanu vs. Emperor:* AIR 1925 Sind 282 which is the only single decision of any Court in India interpreting the words “against the order of nature”.

III. *Interpretation of Section 377 is not in consonance with the scheme of the Act, with established principles of interpretation and with the changing nature of society (a society like the present intent on population control including use of contraception)*

3.1 *Khanu v. Emperor,* AIR 1925 Sind 286 (Bench of two Judicial Commissioners)

> *If so, it is clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of coitus per os is impossible. (Emphasis supplied)*

3.2 Javed v. State of Haryana , (2003) 8SCC 369 at para 38 (3 judges)

> *…..In List III - Concurrent List, Entry 20A was added which reads 'Population control and family planning'. The legislation is within the permitted field of State subjects..... Family planning is essentially a scheme referable to health, family welfare, women and child development and social welfare. Nothing more needs to be said to demonstrate that the Constitution contemplates Panchayat as a potent instrument of family welfare and social welfare schemes coming true for the betterment of people's health especially women's health and family welfare coupled with social welfare. Under Section 21 of the Act, the functions and duties entrusted to Gram Panchayats include 'Public Health and Family Welfare', 'Women and Child Development' and 'Social Welfare'. Family planning falls therein.*

3.3 It is submitted that:

(i) Since Section 377 punishes “whoever”

voluntarily has carnal intercourse *against the order of nature* inter alia with man or woman is to be punished with imprisonment for life or with imprisonment for a term which may extend to ten years, can only be read (in the context of the Section in Chapter XVI read with the heading and not in Chapter XIV read with the heading) as

> *"whoever voluntarily and without consent has sexual intercourse with man, woman or animal shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine."*

(a) Any other interpretation would render liable to long terms of imprisonment any person who has sexual intercourse with his wife other than penile vaginal intercourse;

(b) Any person who has sexual intercourse with a woman whilst using a contraceptive – whether the woman be his wife or not;

3.4 Since both the Centre and the States have the power to make laws for the purposes of population control and family planning under List-III Entry 20A of the Constitution. Since family planning is now a legitimate State policy for the health, family and social welfare and child development a textual interpretation of Section 377 would be in direct contradiction with the objectives of family planning: See *Javed vs. State of Haryana* 2003 (8) SCC 369 para 38 cited above. See also *Suchitra Shrivastava vs. Chandigarh Administration:* 2009 (9) SCC 1 para 2 (3 judges) where the Court has stated that under Article 21 every woman has the right to pro-create "as well as to abstain from pro-creating" as part of the woman's right to privacy, dignity and bodily integrity. The following observations in that case are quoted below:

> *There is no doubt that a woman's right to make reproductive choices is also a dimension of `personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods.*

3.5 Fazal Rab Choudhary v. State of Bihar, (1982) 3 SCC 9. A Bench of two Honourable Judges of this Court observed at para 3

> *The offence is one under Section 377 I.P.C., which implies sexual perversity. No force appears to have been used. Neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking.*

Note: It is respectfully submitted that this is by no means a statement of the law because:

- Special Leave was granted, *' limited to the question of sentence only'*. (para 1)
- The offence under Section 377 was committed against a minor and hence although no force was used, there could never be a valid consent for the act with which the accused was charged.
- The words in para 3 of 1982 (3) SCC page 9 (2 judges) must be read in the context of the Court reducing the sentence imposed by the High Court from three years to six months.
- It should also be noted that while *Fazal Rab Choudhary vs. State of Bihar,* 1982 (3) SCC 9) was repeatedly cited by the other side viz. Delhi Commission for Child Rights, All India Muslim Personal Law Board and B.P. Singhal. It is submitted that this judgment does encapsulate the thrust of the Section. It calls it *"the sexual perversity".* But so

called ‘sexual perversity’ committed in private by a person to his or her own body (e.g. masturbation) is certainly not an offence punishable by Indian Penal Code though the act affects the human body: it causes no harm to anyone other than perhaps to the person practising the act; just as overeating or self-flagellation is not an offence since it causes no harm to anyone except the person practising it.

When the same acts as referred to above (sexual perversity, masturbation or self-flagellation etc) are practised in private by two individuals and not by one, it is respectfully submitted, again that as long as there is no harm. (as long as there is no sexual assault). people should be able to do what they please with their bodies in private.

In terms of Section 377 as understood today in a society which does not regard the purpose of sexual intercourse to be exclusively procreation sexual intercourse between 2 consenting males cannot be regarded as an offence:

(i) where the act is done in private;

(ii) where the act is not in the nature of a sexual assault causing harm to one of the two individuals indulging in it; and

(iii) where no force or coercion is used since there is mutual consent.

In any case in the year 2012, Section 377 of the Indian Penal Code must necessarily be read (as a matter of construction) in the light of constitutional provisions which include the “right to be let alone” and as such there cannot be any offence even though sexual intercourse takes place between 2 adults so long as they are consenting adult males and in private.

The difference between obscene acts in private and public in a place is statutorily recognised in the Penal Code for instance in Section 294 where “whoever to

the annoyance of others does any obscene act in any public place shall be punished with imprisonment for (only) upto three months or with fine or both." Section 377 must be read down because if for instance an act of sodomy which is *per se* obscene is committed in a public place (which without more must per se annoyance to others) the punishment only extends to three months or with fine or with both, whereas if the same act is committed in private the punishment is imprisonment for life or imprisonment which extends to ten years and fine.

IV. The phraseology of Section 377 (carnal intercourse against the order of nature) is quaint and archaic, it should be given a meaning which reflects the era when it was enacted (1860)

4.1 New Websters Dictionary of the English Language , 1981 Ed, p 152.

> *Carnal, karnal, a (L. carnalis, carnal, caro, carnis, flesh.) Pertaining to the body, its passions and appetites; not spiritual; fleshly; sensual; lustful; impure. – car-nal-i-ty, kar-nal'i-te, n. The state of being carnal; want of spirituality; fleshliness; fleshly lust or desire, or the indulgence of such lust; sensuality. – car-nal-ly, kar'nal-le, adv. In a carnal manner; according to the flesh; not spiritually; sensually.*

Note: It needs to be emphasized that the word "carnal intercourse" and not the word "sexual intercourse" is used in Section 377. The words "against the order of nature" suggests something prejudicial which the act causes, regardless of whether there is a victim.

4.2 Benion on Statutory Interpretation, Fifth Edition,2008. p.1213.

> *Sometimes (though very seldom) a term is inserted in an Act even though it is known to be archaic. This may be a technical or non-technical term. It is presumed that the term is intended to have its archaic meaning, though that does not prevent its meaning in the Act from being developed by the courts in the ordinary way.*

(***Annexure VI)***

4.3 Re American Greetings Corpn's Application [1983] 2 All E R 609 at 619

> *"Trafficking" in a trademark has from the outset been one of the cardinal sins of trademark law. But there is no statutory definition of trafficking, and one may suspect that, as with usury in the Middle Ages, though it is known to be a deadly sin, it has become less and less clear, as economic circumstances have developed, what the sin actually comprehends.*

Note: Here too, the origin of the offence is in ecclesiastical law. Buggery was a sin. See Main Note-Theological nature of the origin of anti sodomy statues in England submitted on 1.3.2012. **(Annexure VII**)

4.4 Rover International Ltd v. Cannon Film Sales Ltd (No 2) [1987] I WLR 1597 at 1601

> *It is a phrase which seems to me to be entirely archaic. It has splendid overtones of Elizabeth I's reign and such like matters but it is not a matter, I would think, of current ordinary speech or even lawyers' speech. I doubt if one often says of somebody, "Oh, he is beyond the seas"*

Note: So also with the words "against the order of nature"

V. Section 377 should be interpreted in the context of its placement in the Indian Penal Code as criminalizing an act in someway adversely affecting the human body and not an act which is an offence against morals as dealt with in Chapter XIV

5.1 Section 377 is placed in Chapter XVI headed "Of Offences Affecting the Human Body". All offences in Sections 299 to 377 are offences which are concerning the human body and have an adverse affect on the human body. These offences are further sub-divided under the following heads:

- Of Offences affecting life – Sections 299-311;
- Of the causing of miscarriage, of injuries to unborn children, of the exposure of infants and of the concealment of births-Sections 312-318;
- Of hurt – Sections 319-338;
- Of wrongful restraint and wrongful confinement Sections 339 to 348;

- Of criminal force and assault – Sections 349 to 358;
- Of kidnapping, abduction, slavery and forced labour Sections 359 to 374;
- Sexual offences (formerly headed “rape”) – Sections 375 to 376D
- Of Unnatural Offences- Section 377

5.2 It is submitted that although the language of Section 377 is neutral qua harm or adverse affectation to the body the context in which the section occurs and the use of the words carnal intercourse (not merely sexual intercourse) indicates the words have to be associated with a form of sexual assault.

5.3 This interpretation is further substantiated by the fact that Section 377 is placed at the end of Chapter XVI (Of Offences affecting the human body) and not in Chapter XIV (Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals)

VI. Chapter Headings and sub headings provide a guide to interpreting the scope and ambit of Section 377

6.1 G.P. Singh, *Principles of Statutory Interpretation*, 13 Edition, 2012, pp167- 170 **(Annexure VIII)**

6.2 Raichuramatham Prabhakar v. Rawatmal Dugar, (2004) 4 SCC 766 at para 14 (2 judges)

> *In our opinion, it is permissible to assign the Heading or Title of a section a limited role to play in the construction of statutes. They may be taken as very broad and general indicators of the nature of the subject-matter dealt with thereunder. The Heading or Title may also be taken as a condensed name assigned to indicate collectively the characteristics of the subject-matter dealt with by the enactment underneath; though the name would always be brief having its own limitations. In case of conflict between the plain language of the provision and the meaning of the Heading or Title, the Heading or Title would not control the meaning which is clearly and plainly discernible from the language of the provision thereunder. (Emphasis supplied)*

6.3 DPP v. Schildkamp, 1971 A.C. 1 at page 23. The opinion of

Lord Upjohn

> *For words and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context ' in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statue was intended to remedy.*

VII. Indian Penal Code should be interpreted in the context of changing times

7.1 *Mubarak Ali Ahmed v. State of Bombay*, 1958 SCR 328 at pages 358- 359. (5 judges)

> *It is not necessary and indeed not permissible to construe the Indian Penal Code at the present day in accordance with the notions of criminal jurisdiction prevailing at the time when the Code was enacted. The notions relating to this matter have very considerably changed between then and now during nearly a century that has elapsed. It is legitimate to construe the Code with reference to the modern needs, wherever this is permissible, unless there is anything in the Code or in any particular section to indicate the contrary.*

VIII. It is not the law that alters but the changing conditions of the times.

8.1 *Bidi Supply Co v. Union of India,* 1956 SCR 267 at page 280 (5 judges)

> *Article 14 sets out, to my mind, an attitude of mind, a way of life, rather than a precise rule of law. It embodies a general awareness in the consciousness of the people at large of something that exists and which is very real but which cannot be pinned down to any precise analysis of fact save to say in a given case that it falls this side of the line or that, and because of that decisions., on the same point will vary as conditions vary, one conclusion in one part of the country and another somewhere else; one decision today and another tomorrow when the basis of society has altered and the structure of current social thinking is different. <u>It is not the law that alters but the changing conditions of the times and article 14 narrows down to a question of fact which must be determined by the</u>*

highest Judges in the land as each case arises." (Emphasis supplied)

8.2 Motor General Traders and Another v. State of Andhra Pradesh, (1984) I SCC 222 at para 16 (2 judges)

> *In all these cases while it is true that no provision was actually struck down, there is a firm foundation laid in support of the proposition that what was once a non-discriminatory piece of legislation may in course of time become discriminatory and be exposed to a successful challenge on the ground that it violated Article 14 of the Constitution."*

8.3 John Vallamotham v. Union of India, (2003) 6 SCC 61 at para 36 (3 judges)

> *In any view of the matter even if a provision was not unconstitutional on the day on which it was enacted or the Constitution came into force, by reason of facts emerging out thereafter, the same may be rendered unconstitutional. The world has witnessed a sea-change. The right of equality of women vis-a-vis their male counterpart is accepted worldwide. It will be immoral to discriminate a woman on the ground of sex. It is forbidden both in our domestic law as also international law. Even right of women to derive interest in a property by way of inheritance, gift or bequeath is statutorily accepted by reason of Hindu Succession Act, 1956 and other enactments. This court, therefore, while considering constitutionality of Section 118 of the Indian Succession Act, is entitled to take those facts also into consideration."*

8.4 *Satyawati Sharma v. Union of India,* (2008) 5 SCC 287 at para 32 (2 judges)

> *It is trite to say that legislation which may be quite reasonable and rational at the time of enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equality and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it found that the rationale of classification has become non- existent."*

IX Section 377 is impermissibly vague, delegates policy making powers to the police and results in harassment and abuse of the rights of LGBT persons

9.1 State of MP v. Baldeo Prasad, (1961) I SCR 970 at 989(5 judges)

> *Where a statute empowers the specified authorities to take preventive action against the citizens it is essential that it should expressly make it a part of the duty of the said authorities to satisfy themselves about the existence of what the statute regards as conditions precedent to the exercise of the said authority. If the statute is silent in respect of one of such conditions precedent it undoubtedly constitutes a serious infirmity which would inevitably take it out of the provisions of Art. 19(5). The result of this infirmity is that it has left to the unguided and unfettered discretion of the authority concerned to treat any citizen as a goonda. In other words, the restrictions which it allows to be imposed on the exercise of the fundamental right of a citizen guaranteed by Art. 19(1)(d) and (e) must in the circumstances be held to be unreasonable. That is the view taken by the High Court and we see no reason to differ from it.*

9.2 K.A. Abbas v. Union of India, 1970(2) SCC 780 at para 46. (5 judges)

> *The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution, This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. (Emphasis supplied)*

9.3 Regina v. Rimmington, [2006] I AC 459 at para 32

> *In his famous polemic Truth versus Ashurst written in 1792 and published in 1823, Jeremy Bentham made a searing criticism of judge made criminal law which he called "dog law".*
>
> > *"it is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him*

> *of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he should not do- they won't so much as allow of his being told: they lie till he has done something which they say he should not have done, and then they hang him for it.*
>
> ……..
>
> *"34. No further citation is required. In summary, it is not to be suggested that prior to the implementation of the Human Rights Act 1998, either this court, or the House of Lords, would have been indifferent to or unaware of the need for the criminal law in particular to be predictable and certain. Vague laws which purport to create a criminal liability are undesirable, and in extreme cases, where it occurs, their very vagueness may make it impossible to identify the conduct which is prohibited by a criminal sanction. If the court is forced to guess at the ingredients of a purported crime any conviction for it would be unsafe. That said, however the requirement is for sufficient rather than absolute clarity."*
>
> *There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done. If the ambit of a common law is to be enlarged, it "must be done step by step on a case by case basis and not with one large leap":R v Clark(Mark) [2003] 2 Cr. App R 363, para 13.*

X. Widespread Abuse and harassment of LGBT persons under Section 377 has been incontrovertibly established

10.1 As noted above, in *K.A Abbas v. Union of India,* 1970 (2) SCC 780 at para 46, a Constitution Bench held that *"the invalidity arises from the probability of the misuse of the law to the detriment of the individual"* This becomes applicable in the context of the discussion of the widespread abuse and harassment of LGBT persons under Section 377.

10.2 In the judgment of the Division Bench of the Delhi High

Court (impugned by the Special Leave Petition *(Suresh Kumar Koushal v. Naz Foundation,* Vol I , pages 41, 60, 18, 19 and 79 at paras 21,22, 50, 74 and 94), it has been recorded.

> *"21.To illustrate the magnitude and range of exploitation and harsh and cruel treatment experienced as a direct consequence of Section 377 IPC, respondent No.8 has placed on record material in the form of affidavits, FIRs, judgments and orders which objectively documented instances of exploitation, violence, rape and torture suffered by LGBT persons. The particulars of the incidents are drawn from different parts of the country. In an instance referred to as "Lucknow incident – 2002" in the report titled 'Epidemic of Abuse : Police Harassment of HIV/AIDS Outreach Workers in India' published by Human Rights Watch, the police during investigation of a complaint under Section 377 IPC picked up some information about a local NGO (Bharosa Trust) working in the area of HIV/AIDS prevention and sexual health amongst MSMs raided its office, seized safe sex advocacy and information material and arrested four health care workers. Even in absence of any prima facie proof linking them to the reported crime under Section 377 IPC, a prosecution was launched against the said health care workers on charges that included Section 292 IPC treating the educational literature as obscene material. The health workers remained in custody for 47 days only because Section 377 IPC is a non-bailable offence.*
>
> *22. Then there is a reference to 'Bangalore incident, 2004' bringing out instances of custodial torture of LGBT persons. The victim of the torture was a hijra (eunuch) from Bangalore, who was at a public place dressed in female clothing. The person was subjected to gang rape, forced to have oral and anal sex by a group of hooligans. He was later taken to police station where he was stripped naked,handcuffed to the window, grossly abused and tortured merely because of his sexual identity. Reference was made to a judgment of the High Court of Madras reported as Jayalakshmi v. The State of Tamil Nadu, (2007) 4 MLJ 849, in which an eunuch had committed suicide due to the harassment and torture at the hands of the police officers after he had been picked up on the allegation of involvement in a case of theft. There was evidence indicating that during police custody he was subjected to torture by a wooden stick being inserted into his anus and some police personnel forcing him to have oral sex. The person in question immolated himself inside the police station on 12.6.2006 and later*

succumbed to burn injuries on 29.6.2006. The compensation of Rs.5,00,000/- was awarded to the family of the victim. Another instance cited is of a case where the Magistrate in his order observed that the case involved a hidden allegation of an offence under Section 377 IPC as well, thereby stretching the reach of Section 377 IPC to two lesbian adult women who were involved in a romantic relationship with each other while the initial accusation was only under Section 366 IPC. An affidavit of a gay person is also filed on record. The person was picked up from a bus stand at about 10 p.m. by the police, who accused him of being a homosexual. He was physically assaulted with wooden sticks, taken to police post where he was subjected to sexual and degrading abusive language. During the incarceration in the police post over the night, four police men actually raped and sexually abused him including forcing him to have oral and anal sex. The respondent No.8 has relied upon several other instances of fundamental rights violation of homosexuals and gay persons. The material on record, according to the respondent No.8, clearly establishes that the continuance of Section 377 IPC on the statute book operate to brutalise a vulnerable, minority segment of the citizenry for no fault on its part. The respondent No.8 contends that a section of society has been thus criminalised and stigmatized to a point where individuals are forced to deny the core of their identity and vital dimensions of their personality.

50. The studies conducted in different parts of the world including India show that the criminalisation of same-sex conduct has a negative impact on the lives of these people. Even when the penal provisions are not enforced, they reduce gay men or women to what one author has referred to as "unapprehended felons" thus entrenching stigma and encouraging discrimination in different spheres of life. Apart from misery and fear, a few of the more obvious consequences are harassment, blackmail, extortion and discrimination. There is extensive material placed on the record in the form of affidavits, authoritative reports by wellknown agencies and judgments that testify to a widespread use of Section 377 IPC to brutalise MSM and gay community.Some of the incidents illustrating the impact ofcriminalisation on homosexuality are earlier noted by us.We may quote another glaring example. During Colonial period in India, eunuchs (hijras) were criminalised by virtue of their identity. The Criminal Tribes Act, 1871 was enacted by the British in an effort to police those tribes and communities who 'were addicted to the systematic commission of non-bailable offences.' These

communities and tribes were deemed criminal by their identity, and mere belonging to one of those communities rendered the individual criminal. In 1897, this Act was amended to include eunuchs. According to the amendment the local government was required to keep a register of the name and residences of all eunuchs who are reasonably suspected of kidnapping or castrating children or of committing offences under Section 377 IPC.Commenting on the Criminal Tribes Act in a speech made in 1936, Pt. Jawaharlal Nehru said:

> *"I am aware of the monstrous provisions of the Criminal Tribes Act which constitute a negation of civil liberty... an attempt should be made to have the Act removed from the statute book. No tribe can be classed as criminal as such and the whole principle as such is out of consonance with civilized principles of criminal justice and treatment of offenders..."*

[Dalip D'Souza, Branded by law: Looking at India's Denotified Tribes, Penguin, New Delhi, 2001: page 57] While this Act has been repealed, the attachment of criminality to the hijra community still continues.

74.Learned ASG was at pains to argue that Section 377 IPC is not prone to misuse as it is not enforced against homosexuals but generally used in cases involving child abuse or sexual abuse. Again the submission is against the facts. A number of documents, affidavits and authoritative reports of independent agencies and even judgments of various courts have been brought on record to demonstrate the widespread abuse of Section 377 IPC for brutalising MSM and gay community persons, some of them of very recent vintage. If the penal clause is not being enforced against homosexuals engaged in consensual acts within privacy, it only implies that this provision is not deemed essential for the protection of morals or public health vis-a-vis said section of society. The provision, from this perspective, should fail the "reasonableness" test. (Emphasis added)

94.Section 377 IPC is facially neutral and it apparently targets not identities but acts, but in its operation it does end up unfairly targeting a particular community. The fact is that these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class. Section 377 IPC has the effect of viewing all gay men as criminals. When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. They are subject to extensive

> *prejudice because of what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalised and turned in on itself.*
> *[Sachs, J. in The National Coalition for Gay and Lesbian Equality v. The Minister of Justice, para 108].*

10.3 The findings of the Delhi High Court were based on the averments in the Writ Petition filed by Naz Foundation challenging the vires of Section 377. There is an averment of systematic harassment against homosexual persons, (Suresh Kumar Koushal v. Naz Foundation, Vol -2 , pps 142-144 at paras 33 and 35)

> *33. These realities form the fundamental basis of the petitioners writ petition, which submits that Section 377 prohibitions of homosexual conduct harms the petitioner's services and the public generally because:*
> *By criminalising private consensual same sex conduct:*
> - *Section 377 serves as a weapon for police abused: detaining and questioning, extortion, harassment, forced sex, payment of hush money*
> - *Section 377 perpetuates negative and discriminatory beliefs towards same sex relations and sexuality minorities generally;*
>
> *Which consequently drive the activities of gay men and MSM as well as sexuality minorities generally, underground which cripples HIV/AIDS prevention efforts.*
>
> *35. The outdated presumptions underlying Section 377 include a blatantly prejudicial perception of same sex relations and sexuality minorities. Thus the perception of Section 377 has led to systematic harassment, intimidation, blackmail and extortion by enforcement agencies, families members of the public generally of sexuality minorities, gay men and MSM in particular. Clearly Section 377 creates a class of vulnerable people that is continually victimized and directly affected by the provision.*

10.4 This was supported by the following documents brought on record:

(a) Human Rights Watch Report , July 2002 titled “Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach

Workers in India" annexed to the Counter Affidavit of Respondent 11 at pp 169-204.

Note: This documents instances of harassment of NGO workers including raids on organisations working with HIV/AIDS and other forms of harassment not only in Delhi but in other cities as well. There is no further affidavit by any other Ministry of the Government to contradict the Human Rights Watch Report of 2002.

(b)Affidavits on Record

- Affidavit of Kokila dated 1.11.2007 (Counter Affidavit of Respondent No 11 pp.207-210)

- Affidavit of Mr.XXXXX dated 20.1.2007(Counter Affidavit of Respondent No 11, pp.211-214)

Note: The affidavits document individual instances of torture, harassment and sexual abuse.

(c) Authoritative legal pronouncements in the form of judgments

- *Jayalakshmi v. State* (2007)4 MLJ 849 (Counter Affidavit of Respondent No 11, Annexure R 14, pp.215-225)

Note: deals with the sexual abuse and torture of a eunuch in a police station by the police which resulted in her suicide.

(d) Other authoritative pronouncements in the form of Orders of Magistrate's Court

- Copy of an Order of Metropolitan Magistrate in Delhi alleging an offence under Section 377 against two women. (Counter Affidavit of Respondent 11, Annexure R-11 at p.206)

Note: The Magistrate wrongly applies Section 377 to a case concerning two women even though there is an express requirement of penetration under the Explanation to Section 377. There is thus a presumption of criminality which is attached to LGBT persons even in the minds of officers

responsible for law enforcement and justice delivery.

10.5 In the Counter Affidavit by the Government, Ministry of Home Affairs, there is only a blanket denial. (Counter Affidavit of Respondent No 11, Annexure R2, pps 42-62 at page 46 para 9) The specific instances have not been dealt with.

> *9. A perusal of cases decided under Section 377 shows that it has only been applied on the complaint of a victim and there are no instances of its being used arbitrarily or being applied to situations its terms do not naturally extend to. Section 377 has been applied to cases of assault where bodily harm is intended and/or caused and deletion of the said section can well open floodgates of delinquent behaviour and be misconstrued as providing unbridled license for the same. Sections like Section 377 are intend to apply to situations not covered by the other provisions of the Penal Code and there is neither occasion nor necessity for declaration of the said section unconstitutional.*

10.6 The oral submissions of the ASG that Section 377 is not prone to misuse has not been accepted by the Delhi High Court in para 74 of the impugned judgment (*Suresh Kumar Koushal v. Naz Foundation,* Vol I, p.60 at para 74) (See para 10.1 above)

10.7 In the Special Leave Petitions filed by fifteen petitioners including two parties, Joint Action Kannur, SLP 286/10 and B.P. Singhal, SLP 22267/2009, the harassment is not controverted or denied. On the contrary in SLP No. 20914, ground K at page 117, it is stated,

> *Because it is a matter of record that the Government of Delhi and Delhi Police who are the most important respondents in the case, choose not to file pleadings or counter affidavits in the Honourable High Court for reasons best known to them. Even when the case before the Honourble High Court was pertaining to law and order of the state and the case of based on criminal harassment of the MSM by the police. In addition to the above the HC did not hear the version of the police force of the country in response to the allegations levelled against them. And all states in the country need to be heard before a verdict on a judgment having far reaching consequences of*

decriminalisation of Section 377.

10.8 In the affidavit by National Aids Control Authority (Counter Affidavit of Respondent 11, Annexure R-3 at pp63-67), it is stated that

> *It is submitted that the enforcement of Section 377 of IPC can adversely contribute to pushing the infection under ground, making risky sexual practices go unnoticed and unaddressed. The fear of harassment by law enforcement agencies leads to sex being hurried, having partners with the option to consider or negotiate sager sex practices. As MSM groups lack "safe place" and utilize public places such as railway stations etc. they become vulnerable to harassment and abuse by the police. The hidden nature of MSM groups further leads to poor access to condom, health care services and safe sex information. This constantly inhibits/ impedes interventions under the National AIDS Control Programme aimed at preventing spread of HIV/AID's by promoting safe sexual practice by using condoms or abstaining from multi partner sex etc.*

XI. Section 377 criminalises the essence of the protection offered by Article 21 namely, <u>the right to be let alone</u>

11.1 The wide amplitude of Section 377 insofar as it targets consenting sexual activity between adults in private hits at a core freedom under Article 21 viz. right to personal liberty – the right to be let alone. Further the invalidity of Section 377 vis-à-vis Article 21 arises from the probability of the misuse of the law to the detriment of the individual

11.2 <u>*Kharak Singh v. State of Uttar Pradesh*</u>, [1964] 1 SCR 332 Reg.236 clause (b) is quoted at page 340. Ayyengar J. speaking himself and two other judges at page 347-348 struck down Clause b of Regulation 236 as violative of Article 21):

> *We shall now proceed with the examination of the width, scope and content of the expression "personal liberty" in Art. 21. Having regard to the terms of Article 19(1) (d), we must take it that expression is used as not to include the right to move about or rather of locomotion. The right to move about being excluded in its narrowest interpretation would be that it comprehends nothing more than freedom from physical restraint or freedom from confinement within the bounds of a prison; in other words, freedom from arrest and detention, from false imprisonment or wrongeful confinement<u>. We feel unable to hold that the</u>*

term was intended to bear only this narrow interpretation, but on the other hand consider that ' personal liberty' is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt within the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 take in and comprises the residue. We have already extracted a passage from the judgment of Field, J. in Munn v. Illinois, where the learned judge pointed out that 'life' in the Vth and IV amendments corresponding to Article 21, means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs- his arms, his legs etc. We do not entertain any doubt that the word 'life' in Article 21 bears the same signification. Is then the word 'personal liberty' to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the Preamble of the Constitution that it is designed to 'assure the dignity of the individual' and therefore of those cherished human values as the means of ensuring the full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the constitution which would point to such vital words as 'personal liberty' having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives by no means to stretch the meaning of the phrase to square with any preconcieved notions or doctrinaire constitutional theories. (Emphasis supplied)

11.3 Opinion of Subba Rao J. and Shah J. (who went further and struck down not only clause (b) but Regulations but the entire Regulation 236 as violative of the right to privacy)

(at page 357) -
Now let us consider the scope of Article 21. The expression 'life' cannot be confined to only the taking away of life, ie, causing death. In Munn v. Illinois, Field,J, defined "life" in the following words

> *"Something more than mere animal existence. The inhibition against its deprivation extents to all those limbs and faculties by which life is enjoyed. The provision equally prohibits mutilation of the body by amputation of arm or leg, or putting out*

> *of an eye, or the destruction of any other organ of the body through which the soul communicates through the outre world"*

The expression 'liberty' is given a very wide meaning in America. It takes in all the freedoms. In Bolling v. Sharp the Supreme Court of America observed that the said expression was not confined to mere freedom from bodily restraint and that liberty under law extended to the full range of conduct which an individual was free to pursue. But this absolute right to liberty was regulated to protect other social interests by the State exercising its power such as police powers, the power of eminent domain, the power of taxation etc. The proper exercise of power which is called the due process of law is controlled by the Supreme Court of America. In India the word 'liberty' has been qualified by the word 'personal' indicating thereby that it is confined only to the liberty of the person. The other aspects of the liberty have been provided for in other Articles of the Constitution. The concept of personal liberty is succinctly explained by Dicey in his book on Constitutional Law 9th Edition. The learned author described the ambit of the right at pp. 207-208 thus:

> *"The right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification"*

Blackstone in his commentaries on the law of England, Book I, at p. 134, observed:

> *"'Personal liberty' includes 'the power of locomotion of changing situation, or removing one person to whatever place ones inclination may direct, without imprisonment or restraint unless by due course of law."*

In A.K. Gopalan's case, it is described to mean liberty relating to or concerning the person or the body of the individual; and personal liberty in the sense is the antithesis of physical restraint or coercion. The expression is wide enough to take in a right to be free from the restriction placed on his movements. The expression 'coercion' in the modern age cannot be construed in a narrow sense. In an uncivilized society where there are no inhibitions, only physical restraints may detract from the personal liberty, but as civilization advances the psychological restraint are more effective than the physical ones. The scientific methods used to condition man's mind are in a real sense physical restraints, for they engender physical fear, channeling ones action through anticipated and expected groves. So also the creation of conditions which necessarily engenders inhibitions and fear complexes can be described as physical restraints. Further the right to personal liberty takes in not only

> *the right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true that our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle": it is his rampart against encroachment on his personal liberty. The pregnant word of that famous judge, Frankfurter, J. in Wolf v. Colorado pointing out the importance of the security of one's privacy against the arbitrary intrusion by the police, could have no less application to an Indian home as to an American 'one. If physical restraint on a person's movements affect his personal liberty, physical encroachment on his private life would affect in a larger degree. Indeed nothing is more deleterious to man's physical happiness and health than a calculated interference with his privacy. We would therefore define the right of the personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether these restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under regulation 236 infringe the Fundamental Right of the petitioner under Article 21 of the Constitution.*

Note*: Kharak Singh v. State of UP* was followed in a Constitutional Bench decision, *State of West Bengal v. Committee for Protection of Democratic Rights*, (2010) 3 SCC 571 at para 60

> *Article 21 one the fundamental rights enshrined in Part III of the Constitution declares that no person shall be deprived of his "life" or "personal liberty" except according to procedure established by law. It is trite that the word "life" and "personal liberty" are used in the article as compendious terms to include within themselves all the varieties of life which go to make up the personal liberties of man and not merely the right to the continuance of a person's animal existence*. (*See Kharak Singh v. State of UP*)

11.4 *Gobind v. State of Madhya Pradesh*, (1975) 2 SCC 148 at para 20 and 27 (3 Judges). Judgment of Justice K.K. Matthew speaking for the Court:

> *20. There can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realized as Brandies J. said in his dissent in Olmstead v. United States, the significance of man's spiritual nature, of his feelings and his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore they must be deemed to have conferred upon the individual as against the government a sphere where he should be let alone. (Emphasis supplied)*
>
> *27. There are two possible theories for protecting privacy of home The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might engaging in such activities that such 'harm' is not constitutionally protectible by the state. The second is that individual, need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask. desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may,reflect the values of their peers rather than the realities of their natures. (Emphasis supplied)*

11.5 Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632 at para 26 (2 Judges)

> *The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own; his family, marriage, procreation, motherhood, child-bearing and education among other matters.*

International jurisprudence on the right to be let alone

11.6 It is submitted that it is a well established position that regard may be had to international law and norms for constructing domestic law where there is no inconsistency between them and there is a void in domestic law. See *Vishaka and Ors. v. State of Rajasthan*, (1997) 6 SCC 241*, Gita Hariharan v. Reserve Bank of India*, (1999) 2 SCC 228.

11.7 *Bowers v. Hardwick,* 478 US 186(1986) Dissent of Blackmun

J. at P 199 (Vol III of Compilation of Intervenor 8 on Comparative and International Case Law on Decriminalisation of Same Sex Sexual Actvity Between Adults, pages 1-35 at page 14) Hereinafter referred to as Vol III)

> *This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, ante, at 191 than Stanley v. Georgia, 394 U.S. 557(1969), was about a fundamental right to watch obscene movies, or Katz v. United States, 389 U.S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone."*

11.8 *Lawrence v. Texas,* 539 US 558 (2003), at p.1 (Vol III, pages 36-87 at p. 40)

> *Liberty protects a person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.*

11.9 National Coalition for Gay and Lesbian Equality v. Minister for Justice, Concurring opinion of Sachs J., [1998] 12 BCLR 1517 at para 116 (Vol III, 184-248 at page 238)

> *There is no good reason why the concept of privacy should, as was suggested, be restricted simply to sealing off from state control what happens in the bedroom, with the doleful sub-text that you may behave as bizarrely or shamefully as you like, on the understanding that you do so in private. It has become a judicial cliché to say that privacy protects people, not places. Blackmun J in, Bowers, Attorney General of Georgia v. Hardwick et al made it clear that the much-quoted "right to be left alone" should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on*

with your life, express your personality and make fundamental decisions about your intimate relationships without penalisation.

11.10 *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (Ser A) 1981 at para 41 (Vol III, pages 88-129 at page 102)[1] (at page 102)

"*41. The Court sees no reason to differ from the views of the Commission: the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1 (art. 8-1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life (see. Mutatis mutandis, the Marckx judgment of 13 June 1979, Series A No. 31, p. 13, par. 27): either he respects the law and refrains from engaging – even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution."*

(at page 107-108 at para 60)

"As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States (see, mutatis mutandis, the above-mentioned Marckx judgment, p. 19, par. 41, and the Tyrer judgment of 25 April 1978, Series A No. 26, pp. 15-16, par. 31). In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of

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1 The Dudgeon case was referred to the Court by the European Commission of Human Rights ("the Commission"). The case originated in a direct application against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on 22 May 1976 under Article 25 (Article 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom citizen, Mr. Jeffrey Dudgeon. The case was put up before the plenary Court (ECHR).

private homosexual acts between consenting males over the age of 21 years capable of valid consent (see paragraph 30 above). No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.

It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."

(page 108)

"63. Mr. Dudgeon has suffered and continues to suffer an unjustified interference with his right to respect for his private life. There is accordingly a breach of Article 8 (Article 8)."

(page 110)

"FOR THE REASONS, THE COURT

Holds by fifteen votes to four that there is a breach of Article 8 (art. 8) of the Convention."

XII. Section 377 is ultra vires Article 14 as there is no classification apparent on the face of it

12.1 Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar, 1959 SCR 279 at pages 298- 299 (5 judges)

(iii) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the court will not strike down the law out of hand only because no such classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute

> *has laid down any principle or policy for guiding the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore , the discrimination is inherent in the statute itself. In such a case the court will strike down both the law as well as the executive action taken under such law, as it did in State of West Bengal v. Anwar Ali Sarkar, Dwarka Prasad Laxmi Narain v. The State of Uttar Pradesh and Direndra Krishna Mandal v. The Superintendent and Remembrancer of Legal Affairs. (Emphasis Added)*

12.2 Section 377 is too broadly phrased:

> (a) It includes or may include carnal intercourse between husband and wife ("whoever");
> (b) It may include carnal intercourse between man and women for pleasure and without "the possibility of conception of human being";
> (c) Use of contraceptives between man and woman;
> (d) Anal sex between man (husband) and woman (wife) – i.e. carnal intercourse contrary to the order of nature;
> (e) Consenting carnal intercourse between man and man;
> (f) Non-consenting carnal intercourse between man and man; and
> (g) Carnal intercourse with a child with or without consent.

Note: With respect to point (b), it should be noted that any activity falling within (b) would be against the original intent of Section 377 viz *"that there should be the possibility of the conception of human beings"* AIR 1925 Sind 286. This is the only decision in Indian jurisprudence that clarifies the object of Section 377.

With respect to point (g) it should be noted that there is a Bill pending in the Rajya Sabha titled, *'Sexual Offences Against Children Bill, 2011.* **(Annexure IX)**There is also the 240 Report of the Rajya Sabha Parliamentary Standing Committee on Human Resources Development on *The Protection of Children from Sexual Offences Bill, 2011,* December 2011 **(Annexure X)**

12.3 There is no guidance to the Police Officer as to in which of

all these cases he should undertaken an investigation if he has a reasonable suspicion that there has been a commission of a cognisable offence under Section 377.

12.4 No classification appears on the face of Section 377 and it is for the Investigating Officer in-charge of the Police Station with whom Information is lodged under Section 154 of the Criminal Procedure Code to take steps for investigation under Section 157 if he has “reasons to suspect the commission of an offence” under Section 377. There is no provision in the Penal Code or Criminal Procedure Code laying down any principle or policy for the guidance of the Officer in-charge of the Police Station.

12.5. The Section though facially neutral. (it uses the word “Whoever”) does not lay down any principle or policy for the guidance of the exercise of discretion by the Officer in- charge of the Police Station and discrimination is inherent in the provisions of Section 377 itself. The word “whoever” in the statute indicates that anybody can commit the offence under Section 377 including adults who engage in consensual sexual acts. Further the statute is silent on where the offence can be committed taking within its ambit the most private of places, the home.

12.6 This is in contrast with Section 294 of the Indian Penal Code where an obscene act takes place in a public place and then if it is causes annoyance to any person or group of persons then it is punishable with imprisonment for a term of only three months.

> *294. Obscene acts and songs.- Whoever, to the annoyance of other*
> *(a) does any obscene act in any public place, or*
> *(b) sings, recites or utters any obscene songs, ballad or words, in or near any public place shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.*

12.7 By contrast when an offence under Section 377 is

committed even in a private place, like the home where there is no case of nuisance or annoyance, the punishment extends to ten years or life imprisonment, making the lack of any policy underlying the statute apparent.

12.8 On the basis of suspicion of the commission of a cognisable offence, power is given to any Police Officer even without any order from a Magistrate to arrest the person concerned – Clause (b) of Section 41(1) of the Criminal Procedure Code reads as follows:

> *against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine...*

12.9 The Police Officer is also empowered under Section 165 of the Criminal Procedure Code to make a search of any place, without a warrant from the Magistrate. Section 165 reads:

> *165. Search by police officer.*
> *(1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place with the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.*
>
> *(2) A police officer proceeding under sub- section (1), shall, if practicable, conduct the search in person.*
>
> *(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as*

possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Code as to search- warrants and the general provisions as to searches contained in section 100 shall, so far as may be, apply to a search made under this section.

(5) Copies of any record made under sub- section (1) or sub- section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate.

Such search can be done without a warrant from the Magistrate – the only requirement is in Section 165(5) that the copies of any record made by the Officer conducting the search under Section 165(1) shall be forthwith sent to the nearest Magistrate.

12.10 Besides, the person concerned may be subjected to medical examination under Section 53 of the Criminal Procedure Code.

53. Examination of accused by medical practitioner at the request of police officer.

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub- inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably for that purpose.

12.11 In what instances and in what class of cases the Police officer should register a complaint and proceed further with investigation, search and medical examination etc., is not at all stated or provided for. Further bail may not be granted under Section 437 where the Magistrate is of the opinion that reasonable

grounds exist for believing that the person is guilty of the act punishable under Section 377 with the consequence that the person concerned has to move under Section 439.

12.12 The filing of an FIR it has been now held affects the persons reputation and is a stigma. *In Lalita Kumari vs. State of UP, 2012 (3) SCALE 152 at para 57 (3 judges)*. This was a reference judgement on the question of whether a preliminary inquiry is to be made before registering the FIR or not, the Court observed:

> *It is a trite proposition that a person who is named in an FIR as an accused, suffers social stigma. If an innocent person is falsely implicated, he not only suffers from loss of reputation but also mental tension and his personal liberty is seriously impaired. After Maneka Gandhi's case, the proposition that the law which deprives a person of his personal liberty must be reasonable, both from the standpoint of substantive aspect as well as procedural aspect is now firmly established in our constitutional law. This warrants a fresh look at Section 154 of Cr.P.C. Section 154 Cr.P.C. Must be read in conformity with the mandate of Article 21. If it is so interpreted , the only conclusion is that if a Police Officer has doubts about the veracity of the complaint, he can hold preliminary inquiry before deciding to record or not to record an FIR.*

12.14 There is no principle or policy for guiding the exercise of the discretion of the officer in the matter of selection or classification as to whom the provision applies and the section along with the provision of the Criminal Procedure Code enable the officer to discriminate between persons who may be similarly situated. Such discrimination is inherent in the provision itself.

XIII. Section 377 suffers from the vice of arbitrariness and is violative of Article 14

13.1 In *Menaka Gandhi v. Union of India,* (1978) I SCC 248 at para 7 a seven Judge Bench held that:

> *Now the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundations of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach.*

> *No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate what was pointed out by the majority in E.P. Royappa v. State of Tamil Nadu namely, that "from a positivist point of vie, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. When an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14." Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.*

13.2 In *Mithu vs. State of Punjab,* (1983)2 SCC 277 at page 283 at para 5 and 6 a five judge bench of the Supreme Court has declared Section 303 as unconstitutional and void and struck down section 303 on the ground that it was arbitrary and oppressive and violative of Articles 14 and 21.

> 5. *But before we proceed to point out the infirmities from which section 303 suffers, we must indicate the nature of the argument which has been advanced on behalf of the petitioners in order to assail the validity of that section. The sum and substance of the argument is that the provision contained in section 303 is wholly unreasonable and arbitrary and thereby, it violates Article 21 of the Constitution which affords the guarantee that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by Law. Since the procedure by which section 303 authorises the deprivation of life is unfair and unjust, the section*

is unconstitutional. Having examined this argument with care and concern, we are of the opinion that it must be accepted and section 303 of the Penal Code struck down.

6. In *Maneka Gandhi v. Union of India*, *it was held by a seven Judge Bench that a statute which merely prescribes some kind of procedure for depriving a person of his life or personal liberty cannot ever meet the requirements of Article 21: The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. Bhagwati J. observed in that case that "Principally, the concept of reasonableness must be projected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on that article".* In *Sunil Batra v. Delhi Administration, while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Krishna Iyer J. said that though our Constitution did not have a "due process" clause as in the American Constitution, the same consequence ensued after the decisions in the Bank Nationalisation case and Maneka Gandhi:*

> *"For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter- productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21."*

Desai J. observed in the same case that:

> *"The word 'Law' in the expression 'procedure established by law' in Article 21 has been interpreted to mean in Maneka Gandhi's case that the law must be right, just and fair, and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied. If it is arbitrary, it would be violative of Article 14."*

In Bachan Singh which upheld the constitutional validity of the death penalty, Sarkaria J., speaking for the majority, said that if Article 21 is understood in accordance with the interpretation put upon it in Maneka Gandhi, it will read to say that:

"No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law."

(page 730)

> *These decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the Legislature to prescribe the procedure and for the Court to follow it, that it is for the legislature to provide the punishment and for the courts to impose it. Two instances, undoubtedly extreme, may be taken by way of illustration for the purpose of showing how the courts are not bound, and are indeed not free, to apply a fanciful procedure by a blind adherence to the letter of the law or to impose a savage sentence. A law providing that an accused shall not be allowed to lead evidence in self-defence will be hit by Articles 14 and 21. Similarly, if a law were to provide that the offence of theft will be punishable with the penalty of the cutting of hands, the law will be bad as violating Article 21. A savage sentence is anathema to the civilized jurisprudence of Article 21. These are, of course, extreme illustrations and we need have no fear that our legislatures will ever pass such laws. But these examples serve to illustrate that the last word on the question of justice and fairness does not rest with the legislature. Just as reasonableness of restrictions under clauses (2) to (6) of Article 19 is for the courts to determine, so is it for the courts to decide whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable. The question which then arises before us is whether the sentence of death, prescribed by section 303 of the Penal Code for the offence of murder committed by a person who is under a sentence of life imprisonment, is arbitrary and oppressive so as to be violative of the fundamental right conferred by Article 21.*

Mithu v State of Punjab (A Bench of five judges) was followed in *State of Punjab v. Baldev Singh* (2012) 3 SCC 346 (2 judges). The Court struck down Section 27 (3) of the Arms Act, 1959 which imposed a mandatory death penalty as violative of Article 14.

13.3 In *I.R. Coelho v. State of Tamil Nadu (2007) 2 SCC* 1 where nine judges held:

> *It is evident that it can no longer be contended that protection provided by fundamental rights comes in isolated pools. On the contrary, these rights together provide a comprehensive guarantee against excesses*

> *by state authorities. Thus post-Maneka Gandhi's case it is clear that the development of fundamental rights has been such that it no longer involves the interpretation of rights as isolated protections which directly arise but they collectively form a comprehensive test against the arbitrary exercise of state power in any area that occurs as an inevitable consequence. The protection of fundamental rights has, therefore, been considerably widened.*

13.4. Section 377 is arbitrary insofar as it provides uncanalised power to the law enforcement authorities, and results in the abuse of the rights of LGBT persons and hence is violative of Article 14.

XIV. Section 377 impinges the right of the LGBT person to be free from unjust and unequal treatment and as such shocks the collective conscience of a democracy

14.1 *State of West Bengal v. Anwar Ali Sarkar ,* [1952] SCR 294 at pages 264- 265 four judges of the Court held that provision Section 5(1) of the West Bengal Special Courts Act, 1950 contravenes Article 14 and is void. Bose. J delivered a separate concurring judgment in which he went further and held that the whole of the West Bengal Special Courts Act, 1950 contravened Article 14 and was void. Bose J. put forward a new test under Article 14:

> *What I am concerned to see is not whether there is absolute equality in any academical sense of the term but whether the collective conscience of a sovereign democratic republic can regard the impugned law, contrasted with the ordinary law of the land, as the sort of substantially equal treatment which men of resolute minds and unbiased views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be. Such views must take into consideration the practical necessities of government, the right to alter the laws and many other facts, but in the forefront must remain the freedom of the individual from unjust and unequal treatment, unequal in the broad sense in which a democracy would view it. In my opinion, 'law' as used in article 14 does not mean "the legal precepts which are actually recognised and applied in tribunals of a given time and place" but "the more general body of doctrine and tradition from which those precepts are chiefly drawn, and by which we criticize them."*
>
> *(Dean Pound in 34 Harvard Law Review 449 at 452).*
>
> *I grant that this means that the same things will be viewed differently at different times. What is considered*

> *right and proper in a given set of circumstances will be considered improper in another age and vice versa. But that will not be because the law has changed but because the times have altered and it is no longer necessary for government to wield the powers which were essential in an earlier and more troubled world. That is what I mean by flexibility of interpretation.*

14.2 The classic exposition of Bose J. was followed in *R. Gandhi v. Union of India, 2010 (11) SCC page 1* at para 103.(5 judges): The court partially struck down the Companys (Second Amendment Act, 2002) as violative of Article 14. The said Act provided that a person holding the post of Joint Secretary or equivalent post in the Central or State Government as being qualified for appointment as a Judicial member. This was held to violate Article 14.

14.3 It is submitted that Section 377 arbitrarily targets the LGBT population by criminalising a closely held personal characteristic such as sexual orientation. By covering within its ambit consensual sexual acts by persons within the privacy of their home, it is repugnant to the values of equality and dignity of the person which are the foundations of the constitutional order and offends the collective conscience of a democracy.

14.4 **Lastly,** even if the reasoning by the High Court does not meet with the strict approval of this Hon'ble Court, since the conspectus of the section in Chapter XVI (of which s. 377 forms a part) that the entire chapter contemplates some harm or prejudice to the human body, the conclusion arrived at by the High Court that the provisions of s. 377 does not cover consensual sexual acts between adults in private, is clearly in the interests of justice and this Court ought not to interfere with the conclusion arrived at by the High Court.

14.5 This Court in several cases has held that it was not exercise its jurisdiction under Article 136 if the impugned order serves the interest of justice, even if the impugned order is found not to be correct. In the case of *Union of India v. M.P. Singh* 1990 (Supp)

SCC 701, at paras 7 & 8, this Court has held

> 7. *Assuming the Tribunal committed error in applying 1951 Rules to service of AMEOT prior to 1976, does it call for any interference? Is the order not just and fair? Effect of Tribunal's order is that it cured the injustice perpetrated due to absence of exercise of power by the government under Rule 4(v)(c) of 1951 Rules as it stood amended since 1964. Substantial justice being one of the guidelines for exercise of power by this Court, the order is not liable to interference.*
>
> *8. What is baffling is filing of the special leave petition by Union government. Not because of any injustice to AMEO as that has been taken care of by Tribunal by protecting all those who are working, but because if it works out seniority of AMEOT from back date it may have to pay substantial amount and creation of supernumerary posts may further entail cost. Justice is alert to differences and sensitive to discrimination. It cannot be measured in terms of money. A government of a welfare state has a grueling task of being fair and just and so justice-oriented in its approach and outlook. Mere rectification of its mistakes or omissions by courts and Tribunals should not prompt parties or it to approach this Court by special leave merely for taking a chance or to protect some vested interest except for sake of justice or for laying down law for benefit of court and its guidance. Neither was in this case.*

14.6 In the case of *N. Suriyakala v. A. Mohandoss & Others* (2007) 9 SCC 196, at para 10, it was held

> *The use of the words "in its discretion" in Article 136 clearly indicates that Article 136 does not confer a right of appeal upon any party but merely vests* a discretion *in the Supreme Court to interfere in exceptional cases vide* Bengal Chemicals & Pharmaceutical Works Ltd. V. Employees *AIR 1959 SC 633, at p. 635,* Kunhayammed v. State of Kerala *(2000) 6 SCC 359, and* State of Bombay v. Mistry *(1982) 3 SCC 331. In* Municipal Board, Pratabgarh v. Mahendra Singh

Chawla *and* Chandra Singh v. State of Rajasthan *(2003) 6 SCC 545* *this Court observed that under Article 136 it was not bound to set aside an order even if it was not in conformity with law, since the power under Article 136 is discretionary.*

14.7 It therefore prayed that this Hon'ble Court may be pleased to dismiss the Special Leave Petitions.

New Delhi Counsel for Intervenors

Date: